IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-636

DUANE FAGNAN,
Petitioner,

v.

GREAT CENTRAL INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 13, 1978

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Duane Fagnan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which was entered in this proceeding on May 30, 1978.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Seventh Circuit, which was reported as *Fagnan v. Great Central Insurance Company,* 577 F. 2d 418 (7th Cir. 1978), is printed in the Appendix which is attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 30, 1978. A petition for rehearing was made and filed by the petitioner. On July 17, 1978, the United States Court of Appeals for the Seventh Circuit denied the petition for rehearing without opinion. A copy of this denial is printed in the Appendix attached hereto. The jurisdiction of this Court is now, within ninety (90) days of the denial of the petition for rehearing, invoked under 28 U.S.C. sec. 1254.

QUESTION PRESENTED

Is the petitioner precluded by the compulsory counterclaim provisions of Rule 13 (a), Fed. R. Civ. P. from maintaining this direct action for personal injuries against the respondent insurance company, considering that under the applicable laws of the state of Wisconsin the petitioner has a separate and distinct substantive right of action against the respondent that would be maintainable in the courts of the state and that the respondent was never a party to a prior action which involved the petitioner?

FEDERAL RULE OF CIVIL PROCEDURE AND STATE AND FEDERAL STATUTES INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE

Rule 13 (a), Fed. R. Civ.P. provides in pertinent part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction....

UNITED STATES CODE

The rules Enabling Act, 28 U.S.C. sec. 2072 provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions ...
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> ...

WISCONSIN STATUTES

Insurance, sec. 204.30 (4), *Wis. Stats.*, 1973 provided:

Any bond or policy of insurance covering liability to others by reason of negligence shall be deemed and construed to contain the following conditions: That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property, irrespective of whether such liability be *in praesenti* or contingent and to become fixed or certain by final judgment against the insured, when caused by negligence, such liability not to exceed the amount named in said bond or policy. The right of direct action herein given against an insurer shall exist whether or not the policy or contract of insurance contains a provision forbidding such direct action.

(This section was in effect at the time of the accident involved in this case. It was repealed effective June 22, 1976, by L. 1975, ch. 375, sec. 13. The substantive right of action against insurers is presently contained in the new Insurance Code at sec. 632.24, *Wis. Stats.* 1975.)

Wisconsin Rules of Civil Procedure, sec. 803.04 (2) (a), *Wis. Stats.*, 1975 provides:

In any action for damages caused by negligence, any insurer which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend

said action or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action on account of any claim against the insured. If the policy of insurance was issued or delivered outside this state the insurer is by this paragraph made a proper party only if the accident, injury or negligence occurred in this state.

(By Wisconsin Supreme Court Order, 67 Wis. 2d 646, 1975, this section became effective as to all actions commenced on or after January 1, 1976. It replaced the former procedural sec. 260.11(1), *Wis. Stats.* which was in effect on the date of this accident.)

STATEMENT OF THE CASE

Duane Fagnan's claim against Great Central Insurance Company arose out of an automobile collision which occurred in Wisconsin on May 16, 1975. Duane Fagnan, who is a citizen of Wisconsin, was the driver, of one automobile. He was seriously injured in the accident. The driver of the other car, Robert Thompson, was killed, and his passenger, David Harness, was injured. The automobile which Thompson was driving was owned by his father, Darrold Thompson. Robert Thompson was insured under a liability policy which his father had purchased from Great Central.

After the accident Thompson's passenger, David Harness brought an action in the United States District Court for the District of Minnesota./[1] The sole defendant named was the

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/[1]That action was entitled *David Harness v. Stanley W. Davies, Special Administrator of the Estate of Robert D. Thompson,* No. 3-75-388 (D. Minn., 3rd Div.)

administrator of the estate of Robert Thompson. Jurisdiction was based on diversity of citizenship in that Harness was a citizen of California and Thompson's administrator was a citizen of Minnesota. Thompson's administrator thereafter filed a third party complaint for contribution against Duane Fagnan, and Duane Fagnan answered denying the administrator's claim. Later David Harness filed a complaint under Rule 14 (a), Fed. R. Civ. P. against Duane Fagnan, and Duane Fagnan answered and crossclaimed against Thompson's administrator for contribution. Within a few weeks the Harness case was settled, and the district court dismissed the action *sua sponte* on December 17, 1976.

Great Central was never a party to the Minnesota action before it was dismissed.

On March 3, 1977, Duane Fagnan commenced this direct action for personal injuries against Great Central Insurance Company in the Circuit Court for St. Croix County, Wisconsin. The action was based on Wisconsin's substantive direct action statute in effect at the time of the accident, sec. 204.30 (4), *Wis. Stats.*, and the procedural direct action statute in effect at the time the action was commenced, sec. 803.04 (2) (a), *Wis. Stats.* On demand of Great Central, the case was removed to the United States District Court for the Western District of Wisconsin. The demand for removal was based on diversity of citizenship pursuant to 28 U.S.C. sec. 1441./[2]

/[2]The petitioner's father, Raymond Fagnan, also joined as a plaintiff in this state court action which was removed to federal district court, and the petitioner's father was later joined as an appellee

After trial to a jury, a verdict was returned which found that Great Central's insured, Robert Thompson, was 100 percent negligent in causing Duane Fagnan's serious injuries. Judgment was entered against Great Central in the sum of $55,338.34 plus interest.

Great Central thereafter appealed the judgment of the district court to the United States Court of Appeals for the Seventh Circuit on the ground that Duane Fagnan's action was barred by Rule 13(a), Fed. R. Civ. P. The Court of Appeals accepted this contention, which had been rejected by the district court, and reversed the judgment in favor of Duane Fagnan.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Issues Which Should Be Settled By This Court Concerning The Proper Interpretation Of Rule 13(a), Fed. R. Civ. P. And The Relationship Of State And Federal Law In Its Administration.

The opinion of the Court of Appeals is essentially that (1) Great Central is liable under

(Footnote 2 continued)
in the Court of Appeals. The Court of Appeals affirmed the judgment of the district court which awarded medical expenses to the petitioner's father, and that portion of the judgment is therefore not challenged here. Robert Thompson's father, Darrold Thompson, was joined as a defendant in the state court and federal district court. A directed verdict was entered in his favor by the district court.

Wisconsin law "only if the insured, Robert Thompson's administrator, is liable," (2) Robert Thompson's administrator is not liable because Duane Fagnan's claim "was extinguished by the judgment" in the United States District Court for the District of Minnesota under Rule 13(a), Fed. R. Civ. P., and therefore (3) "(b)ecause Duane Fagnan's claim against the administrator is barred, his claim against the insurer is also barred." *Fagnan v. Great Central Insurance Company,* 577 F. 2d 418, 420 (7th Cir. 1978).

Both of the premises on which the opinion is based have greatly oversimplified the law and are wrong (discussed below). These errors have not only led to a conclusion that is disastrous for this petitoner; this opinion will also confuse and complicate future federal interpretations of Wisconsin law, future federal and state interpretations of Rule 13(a) and, most significantly, the relationship of the federal procedural rule to state law in diversity actions.

Because of the severity of the penality, the procedural bar which may be produced by failure to comply with the compulsory counterclaim requirement of Rule 13(a) is of great concern to litigators and litigants. They need to know its perimeters. This Court has only once briefly referred to a procedural bar created by Rule 13(a). *Baker v. Gold Seal Liquors, Inc.,* 417 U.S. 467, 469 n.1, 41 L.Ed. 2d 243, 94 S.Ct. 2504 (1974). By hearing this case, the Court would clarify its interpretation of the nature of the procedural bar under Rule 13(a) and its relationship to and effect upon state law. The Court would also right a substantial injustice which has done to this petitioner in relying upon state law and the plain words of the rule.

II. The United States Court Of Appeals For The Seventh Circuit Has Decided An Important Question Of Wisconsin State Substantive Law In Conflict With the Decisional Law Of The State.

The Court of Appeals cited *Nichols v. U.S.F. & Guaranty Co.,* 13 Wis. 2d 491, 109 N.W. 2d 131 (1961), and *Hunt v. Dollar,* 224 Wis. 48, 271 N.W. 405 (1937), for its rule that actions against insurers under Wisconsin's direct action statutes are "derivative," meaning "the insurer is not liable unless the assured is."

The statements in those cases were taken out of context and clearly do not apply to this case. The significant part of the *Nichols* opinion which was omitted in the opinion of the Court of Appeals is:

> ... The third party can only recover from the insurer by virtue of the contract existing between it and its insured, *and if the limits and coverage of the policy are properly pleaded and proved, the policy determines the insurer's liability with some exceptions not material to this case. Id.,* 13 Wis. 2d at p. 499 (emphasis supplied to note omitted portion).

Both *Nichols* and *Hunt* concerned only the extent of an insurer's liability *under the coverage and conditions of the policy.* The Court of Appeals is wrong in using those cases to say that no claim can be maintained against an insurer in Wisconsin where a claim cannot be maintained against the

insured. Such claims can be and have been maintained. *Kujawa v. American Indemnity Co.*, 245 Wis. 361, 14 N.W. 2d 31, 151 A.L.R. 1133 (1944) (statute of limitations barring suit against insured); *See also, Burling v. Schroeder Hotel Co.*, 238 Wis. 17, 298 N.W. 207 (1941) (bankruptcy of the insured).

This unique situation is due to Wisconsin's being one of the very few states to have created a valuable, separate and distinct substantive right of action in favor of injured parties against insurers. *Miller v. Wadkins*, 31 Wis. 2d 281, 142 N.W. 2d 855 (1966). *See, also,* this Court's opinion in *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 99 L.Ed 59, 75 S.Ct. 151 (1954).

The substantive liability of an insurance company to an injured party was, at the time of this accident, imposed by sec. 204.30(4), *Wis. Stats.*/[3] Under the substantive direct action statute, the injured party need not sue the tortfeasor *at all* in order to recover but may sue the insurer alone. *See e.g., Kujawa, supra,* 245 Wis. at pp. 363-364.

Direct action gives the injured party a status in the nature of third party beneficiary of a liability

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/[3] *Miller, supra,* 31 Wis. 2d at p. 283. This case clarified that sec. 204.30(4) of the direct action statutes "is substantive and creates direct liability between the injured third person and insurer." (Sec. 204.30 (4) was repealed in 1975, and the substantive liability of insurers is now relocated in sec. 632.24 of the new Insurance Code.) *Miller* also clarified that sec. 260.11 (1) of the direct action statutes was procedural in nature. That section was replaced by sec. 803.04 (2) (a) when the new Wisconsin Rules of Civil Procedure were adopted, effective as to actions commenced on or after January 1, 1976.

insurance policy. *See e.g., Severson v. Milwaukee Auto Ins. Co.*, 265 Wis. 488, 61 N.W. 2d 872 (1953). An injured party need not obtain *any* judgment against the insured. The insured need not be a party to *any* action by the claimant or suffer *any* loss in order for the insurer to be liable to the injured party in a direct action. All that need be proven in a direct action against an insurer alone is that its insured was causally negligent and that the policy of insurance covered this negligence. *See also,* Professor Weckstein, 1965 *Wisconsin Law Review* 268, at pp. 277-281.

Some of these established principles of the unique law of direct action were recognized by this Court in *Lumberman's Mut. Cas. Co., supra,* in which Mr. Chief Justice Warren discussed the similar law of Louisiana:

> ... The Louisiana courts have characterized the statute as creating a separate and distinct cause of action against the insurer which an injured party may elect *in lieu* of his action against the tortfeasor ... The tortfeasor in a Louisiana direct action against the insurer is not (an indispensable party). The state has created an optional right to proceed directly against the insurer; by bringing the action against (the insurer), respondent has apparently abandoned her action against the tortfeasor ... *Id.*, 348 U.S. at pp. 51, 52.

The Court of Appeals in this case held that by exercising his option under state law and abandoning an action on his claim against the administrator after the Harness case settled, the petitioner also abandoned his separate substantive right to sue Great Central on his claim. This is a

misunderstanding of the law of Wisconsin and the operation and effect of Rule 13 (a) on state law.

The Wisconsin Supreme Court *has* considered situations in which claims may be made against an insurer even though a claim could not be made against the insured. In *Kujawa, supra,* 245 Wis. at p. 366, the court spelled out the rule of an insurer's liability: If an injured person has a cause of action/[4] against an insured at the time an action is commenced against his insurer, his separate substantive right to sue the insurer alone on that cause of action will remain even though the injured person may lose his right to sue the insured.

In this case the petitioner's "cause of action" or claim is based upon the wrongful act of Great Central's insured, Robert Thompson. At the time this action was commenced in state court, nothing under state or federal law precluded the petitioner from prosecuting his claim against Thompson's administrator and therefore nothing precluded him from prosecuting his claim against Great Central. Contrary to the holding of the Court of Appeals, the petitioner's claim under *state* law was not "extinguished" by the *federal* procedural bar. When this action was later removed to federal court from state court and the procedural bar was raised as to the availability of a suit against the *administrator* in federal court, under the specific rule of *Kujawa,* the petitioner's substantive right to sue Great

/[4]A "cause of action" is defined in Wisconsin as "a grouping of facts falling into a single unit or occurrence as a lay person would view them. This grouping of facts consists of 'the defendant's wrongful act.'" *Caygill v. Ipsen,* 27 Wis. 2d 578, 582, 135 N.W. 2d 284 (1965).

Central remained completely intact under state law.

The petitioner would only have been precluded from suing the administrator in the courts of Wisconsin if a failure to plead a compulsory counterclaim in federal court operated as *res judicata* or estoppel in a subsequent suit in state court on the claim. No federal law precluded such a state action. It is established law that where a federal court has rendered an *in personam* judgment in a diversity action, a state court is bound to give that judgment "such effect, *and such effect only,* as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority." *Pittsburgh & C. Railway v. Long Island Loan & Trust Co.,* 172 U.S. 493, 510, 43 L.Ed. 528, 19 S.Ct. 238 (1899) (emphasis supplied); *Kline v. Burke Construction Co.,* 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077 (1922); *See also County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 3 L.Ed. 2d 1163, 79 S.Ct. 1060 (1959); and *Vendo Co. v. Lekto-Vend Corp.,* 433 U.S. 623, 53 L.Ed. 2d 1009, 97 S.Ct. 2881 (1977). Only where a claim is finally decided by a federal court in prior litigation has this Court said a state court must apply the doctrine of *res judicata* to bar a subsequent action on the claim in state court. *See e.g., City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 2 L.Ed. 2d 1345, 78 S.Ct. 1209 (1958).

It has been specifically recognized in the lower federal courts that failure to assert a compulsory counterclaim under Rule 13 (a) does not preclude a state court from subsequently hearing the claim. *Miller v. Baird,* 239 F. Supp. 754 (D.C. Tenn. 1965); *Red Top Trucking Corp. v. Seaboard Freight Lines,* 35 F. Supp. 740 (D.C. N.Y. 1940). The purpose of Rule 13 (a) is to prevent multiple lawsuits in *federal*

courts. If a subsequent claim is brought in a state court, no federal interest in efficiency is disturbed. And no challenge is made to the integrity of the federal courts if a state court hears a claim that was never considered by a federal court.

Wisconsin does not recognize the compulsory counterclaim rule and will apply the doctrines of *res judicata* and estoppel by record to a claim *only* where there is "an identity between the causes of action or issues sued on," *Leimert v. McCann*, 79 Wis. 2d 289, 294, 255 N.W. 2d 526 (1977). Because the action against the petitioner in Minnesota concerned only a claim for contribution involving the injuries of Harness and this separate action involves a wholly different cause of action that was not litigated, the petitioner was in no way barred from maintaining this claim in the state courts of Wisconsin.

Because the petitioner's claim against Great Central was not in any way "extinguished" under state law, he could only have been precluded by Rule 13 (a) from suing Great Central if Great Central had been an "opposing party" in the action in the federal court in Minnesota. But Great Central was not only not an *opposing party*, it was not a *party* at all.

III. The United States Court Of Appeals For The Seventh Circuit Interpreted Rule 13 (a), Fed. R. Civ. P. So That It Abridges A Substantive Right Created By The Law Of The State Of Wisconsin In Violation Of The Rules Enabling Act And Established Doctrines Of Federalism.

It is fundamental that in diversity actions federal courts must follow the applicable substantive law of the states:

> ... The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court ... *Guaranty Trust Co. v. York*, 326 U.S. 99, 89 L.Ed. 2079, 65 S.Ct. 1464 (1945).

It is equally fundamental that the Federal Rules of Civil Procedure may not be interpreted so as to "abridge, enlarge or modify any substantive right," Rules Enabling Act, 28 U.S.C. sec. 2072:

> Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose... *Sibbach v. Wilson & Co.*, 312 U.S. L, 85 L.Ed. 481, 61 S.Ct. 422 (1941).

Because petitioner's claim arose in Wisconsin, the substantive law of Wisconsin applies to this case. As discussed above, Wisconsin still recognized the petitioner's claim against Great Central after judgment was entered in the federal action in Minnesota. Nothing under the substantive law of Wisconsin (or procedural law for that matter)

precluded the petitioner from maintaining this action. That is, obviously, why Great Central removed this case from state court to federal court in an attempt to take advantage of a bar that did not exist in Wisconsin./[5] Unfortunately, the Court of Appeals approved of this.

But Rule 13 (a) concerns only counterclaims which must be made in an action in the *federal* system, and it has no applicability to Great Central because Great Central was not an opposing party to the prior federal action. By holding that Rule 13 (a) has extinguished a claim that was clearly maintainable under state law, the Court of Appeals has interpreted a federal rule of procedure so that it abridges the petitioner's substantive right to sue Great Central under the law of Wisconsin in violation of 28 U.S.C. sec. 2072 and established doctrines of this court.

IV. The Interpretation Of Rule 13 (a), Fed. R. Civ. P. Which The United States Court Of Appeals For The Seventh Circuit Has Made Conflicts With The Interpretations Of The Rule Which Have Been Made In Other Circuits.

Since Rule 13(a) only requires a party to assert a counterclaim against an "opposing party", it follows that a subsequent action on a claim should

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/[5]Great Central did not argue in the Court of Appeals that this action was "derivative" under Wisconsin law and therefore barred. Rather, Great Central argued that it was an "opposing party" for purposes of Rule 13 (a) because it was "in privity" with Thompson's administrator.

only be precluded if the subsequent claim is made against a party who was an "opposing party" to a former action.

There are two separate requirements within the term "opposing party". First, before Rule 13(a) applies the person against whom a claim is made must, at the least, be a party to the action. *See e.g., U.S. v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25 (D.C. Ga. 1972). And second, the person against whom a claim is made must be an *opposing* party, *See e.g.*, 3 *Moore's Federal Practice*, sec. 13.06, and *Annotation:* 1 *A.L.R. Fed.* 815, which discuss the federal cases that have not allowed a defendant to counterclaim against a plaintiff in his individual capacity when the plaintiff sued in his representative capacity.

In this case, Great Central was not only not an opposing party of Duane Fagnan in the action in federal district court for Minnesota, Great Central was not a party at all. Great Central contended that because there was a federal procedural bar prohibiting the litigation of the administrator's liability for Thompson's negligence, there should be a procedural bar prohibiting a suit to determine its liability for Thompson's negligence. The Court of Appeals agreed on the reasoning that Great Central could not be sued because the claim against it is "derivative" of the claim against the administrator.

But even assuming that Great Central's liability were "derivative" under Wisconsin law, that does not mean that a Rule 13(a) procedural bar as to suit against one person who is individually accountable for an act of negligence operates to bar a separate action against another who is also individually and separately accountable for that act.

In *Mesker Bros. Iron Co. v. Donata Corp.*, 401 F. 2d 275 (4th Cir. 1968), the Fourth Circuit recognized that since a suit by a principal (whose liability is "derived" from the liability of his agent) does not bring the agent within the court's jurisdiction if the agent has not been joined, a defendant's failure to assert a compulsory counterclaim against the principal does not bar a later suit against the agent on the same claim. This and other authorities have recognized that it is one thing to construe the term "opposing party" liberally in a permissive counterclaim situation in order to dispose of several claims in one action, und it is quite another thing to construe it liberally in imposing a bar against making a claim. 3 *Moore's Federal Practice,* sec. 13.06(1), at pp. 13-131.

A procedural bar is a severe penalty. It ought not to be imposed upon a party who has relied on the term "opposing party" as meaning just what it says. The rule focuses on the *party* involved, not on the claim. Its objective is only to dispose of all claims between *parties* to the litigation.

Here the administrator was by law made liable in his administrative capacity for the negligence of Robert Thompson. Great Central was also, and separately, liable for Robert Thompson's negligence under state direct action law. Although the petitioner may have abandoned his right to sue the administrator in federal court, he did not abandon his right to sue Great Central on the claim. This is because under Rule 13(a) Great Central simply was not a party to the action in Minnesota.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit.

Dated this 13 day of October, 1978.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2272

DUANE FAGNAN and RAYMOND FAGNAN,

Plaintiffs-Appellees,

v.

GREAT CENTRAL INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin—No. 77-C-162.
William G. Juergens, *Judge.*

ARGUED APRIL 21, 1978—DECIDED MAY 30, 1978

Before TONE and BAUER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

TONE, *Circuit Judge.* The issue presented is whether the federal compulsory counterclaim rule, Rule 13(a), Fed. R. Civ. P., precludes an action against an insurance company under the Wisconsin direct action statute, when an action directly against the insured would be barred by the rule. The District Court answered this question in the negative and entered judgment against the insurance company. We reverse.

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* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

The collision of two automobiles in Wisconsin resulted in the death of one of the drivers, Robert Thompson, and injuries to his passenger, David Harness. The driver of the other automobile, Duane Fagnan, was also injured.

Harness, Thompson's passenger, brought an action against the administrator of Thompson's estate in the United States District Court for the District of Minnesota. The administrator filed a third party claim for contribution against Fagnan, who filed an answer to that claim. Later Harness filed a claim under Rule 14(a) against Fagnan, which Fagnan also answered. In addition, Fagnan cross-claimed against the administrator for contribution. The case was settled without a trial, and the court dismissed the action. Under the last sentence of Rule 41(b), Fed. R. Civ. P., the dismissal operated as an adjudication upon the merits.[1]

A few months after the action in Minnesota was dismissed, Duane Fagnan and his father, Raymond Fagnan, sued in a Wisconsin state court against Thompson's insurer, Great Central Insurance Company, under the Wisconsin direct action statute. Raymond Fagnan's claim was for medical expenses and care of his minor child incurred as a result of the action.[2] Also named as a defendant was Thompson's father, Darrold Thompson.

[1] The court's order of dismissal recited that the court had been reliably informed that the case had been settled but the attorneys had "been negligent for some time in getting a stipulation of dismissal signed and filed." The court, therefore, *sua sponte* dismissed the action, retaining jurisdiction for 10 days, within which the parties could move to vacate. A stipulation to dismiss with prejudice had already been signed, the record before us shows, although it was apparently never filed with the court. The order of dismissal became final at the expiration of the 10 days and fell within the final category, "any dismissal not provided for in this rule," of Rule 41(b) and as such operated as an adjudication upon the merits.

[2] Under Wisconsin law a parent's liability for the medical expense and care of his minor child are separate causes of action from the child's personal injury claims and can only be asserted by the parent. *Sulkowski v. Schaefer*, 31 Wis.2d 600, 143 N.W.2d 512, 515 (1966).

The defendants removed the case to the United States District Court for the Western District of Wisconsin, where a trial before a jury resulted in a directed verdict in favor of Darrold Thompson, from which no appeal is taken, and verdicts in favor of both Duane Fagnan and Raymond Fagnan against the insurer, who appeals.

Relying on Rule 13(a), the insurer argues that any claim of Duane Fagnan against Robert Thompson's estate was disposed of by the judgment in the Minnesota action. The insurer now concedes that the award to Raymond Fagnan of damages for the medical expenses and care of Duane Fagnan cannot properly be challenged, since Raymond Fagnan was not a party to the Minnesota action. Accordingly, the judgment in his favor is not subject to attack.

I.

At the time of the accident in this case, Wisconsin's direct action statutes were Wis. Stat. §§ 204.30(4) and 260.11(1). Section 204.30(4)[3] was substantive and created "direct liability between the insured third person and the insurer," while § 260.11(1)[4] provided the procedural

[3] Section 204.30(4) provided in pertinent part:

> Any . . . policy of insurance covering liability to others by reason of negligence shall be deemed and construed to contain the following conditions: That the insurer shall be liable to the persons entitled to recover . . . for injury to person . . . irrespective of whether such liability be in praesenti or contingent and to become fixed or certain by final judgment against the insured, when caused by negligence, such liability not to exceed the amount named in said . . . policy.

This section was repealed effective June 22, 1976, by L. 1975, ch. 375, § 13.

[4] Section 260.11(1) provided in pertinent part:

> In any action for damages caused by negligence, any insurer which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution,

(Footnote continued on following page)

vehicle by which the insurer could be made a party defendant. *Miller v. Wadkins*, 31 Wis.2d 281, 142 N.W.2d 855 (1966). *See Koss v. Hartford Accident & Indemnity Co.*, 341 F.2d 472 (7th Cir. 1965). However,

> [t]he fact that a third prty can sue an insurer of a motor vehicle direct . . . without first recovering a judgment against the insured defendant does not enlarge the coverage afforded by such policy or determine the insured's liability thereunder. The third party can only recover from the insurer by virtue of the contract existing between it and its insured.

Nichols v. U.S.F. & Guaranty Co., 13 Wis.2d 491, 109 N.W.2d 131, 136 (1961).

Therefore, an insurance company's liability under the Wisconsin direct action statute is derivative, *i.e.*, the "insurer is not liable unless the assured is." *Hunt v. Dollar*, 224 Wis. 48, 271 N.W. 405, 409 (1937). Thus the insurer is liable in this action only if the insured, Robert Thompson's administrator, is liable.

II.

Rule 13(a) provides in pertinent part as follows:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the

[4] *continued*
defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured if the policy of insurance was issued or delivered outside the state of Wisconsin, the insurer is by this section made a proper party defendant only if the accident, injury, or negligence occurred in the state of Wisconsin.

The procedural authority to join the insurer as a party presently is contained in § 803.04(2)(a).

> pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . . .

A compulsory counterclaim that is not asserted is barred by the judgment. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); *Pipeliners Local Union No. 798, Tulsa, Okl. v. Ellerd*, 503 F.2d 1193, 1198 (10th Cir. 1974).

Duane Fagnan's claim against Robert Thompson's administrator existed at the time the pleadings were served in the Minnesota action,[5] arose out of the same transaction or occurrence that was the subject of that action, and did not require for its adjudication the presence of third parties. It was therefore a compulsory counterclaim and was extinguished by the judgment in that action.

Because Duane Fagnan's claim against the administrator is barred, his claim against the insurer is also barred. The judgment in favor of Duane Fagnan against Great Central must therefore be reversed.

Affirmed in part and reversed in part. Each side will bear its own costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] Duane Fagnan also could have asserted his direct action against the insurer, which Minnesota law permitted him to do in view of the existence of the Wisconsin direct action statute. *Myers v. Government Employees' Insurance Company*, 302 Minn. 359, 225 N.W.2d 238 (1974).

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUL 19 1978

July 17, 19 78.

Before

Hon. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

DUANE A. FAGNAN and RAYMOND FAGNAN
Plaintiffs-Appellees,

No. 77-2272 vs.

GREAT CENTRAL INSURANCE COMPANY,
Defendant-Appellant.

On Petition for Rehearing and Suggestion for Rehearing En Banc

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Duane A. Fagnan and Raymond Fagnan, Plaintiffs-Appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Hon. William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

IN THE

Supreme Court of the United States

October Term, 1978
No. 78636

DUANE FAGNAN,

Petitioner,

vs.

GREAT CENTRAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 9, 1978

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Great Central Insurance Company opposes the request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals and respectfully requests that the petition herein be denied.

JURISDICTION

Respondent does not dispute Petitioner's jurisdictional statement.

QUESTION PRESENTED

Does a party's right to name a liability insurance company as a defendant in a suit for damages under a state's direct action statute require the conclusion that the insurance company can be held liable to that party even though the party's claim against the insured would be barred because of a defense such as that embodied in the compulsory counterclaim rule?

STATEMENT OF THE CASE

Respondent is in substantial agreement with petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I. CIRCUIT COURT'S OPINION IS CLEAR AND IS BASED ON SUBSTANTIAL AND SOUND JUDICIAL PRECEDENT.

Great Central insured Darrold Thompson with respect to liability for damages caused by him and members of his household in connection with automobile accidents. When a lawsuit was brought in Federal Court against the estate of Robert Thompson, Darrold's son, alleging negligence on Robert's part in causing an automobile accident on May 16, 1975, Great Central Insurance Company retained counsel and defended the estate under the terms of the policy issued to Darrold Thompson. In that action, the driver of the second car, Duane Fagnan, was ultimately joined as a party defendant.

The Minnesota litigation was reduced to judgment pursuant to stipulation of all the parties. This occurred without Fagnan at any time asserting a claim for his personal injuries against the estate of Robert Thompson.

In the matter now before the Court, Fagnan sought to avoid the obvious compulsory counterclaim defense available to the estate by suing only the owner of the car and his insurer, Great Central. The owner of the vehicle was awarded a directed verdict at the close of all of the evidence. Great Central's argument to the Trial Court that it was entitled to dismissal for the same reasons that judgment of dismissal would have been required had the estate been sued was rejected.

On Great Central's appeal, the Circuit Court of Appeals reversed and held that under Wisconsin's Direct Action Statute an injured party has neither a better nor a worse claim against an insurer then he has against its insured. The Court's ruling is clear and concise. It follows from a common sense reading of Rule 13(a), W.S.A. 204.30(4) and W.S.A. 803.04 (2)(a). What is more, the ruling is consistent with and not contrary in any way to the host of federal decisions that have been handed down concerning the scope and effect of the Rule 13(a) bar.

That there is no significant controversy concerning the issue resolved by the lower court and as to which petitioner now seeks review is demonstrated by the petitioner's conspicuous failure to direct this Court's attention to any other decisions by courts of appeals which are in conflict with the position taken by the lower court in the instant case.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE STATE OF WISCONSIN.

The Court of Appeals correctly interpreted *Nicols v. U.S.F. & Guaranty Co.*, 13 Wis.2d 491, 109 N.W.2d 131 (1961) and *Hunt v. Dollar*, 224 Wis. 48, 271 N.W. 405 (1937) when it concluded that Wisconsin's direct action statute does not create liability against the insurer if, at the outset, its insured is not potentially liable.

If the language from the *Nichols* decision which is quoted in the opinion of the Court of Appeals[1] does not conclusively establish the point for which Great Central has contended throughout these proceedings, then surely this further statement of the Wisconsin Supreme Court in *Hunt* should lay any further dispute to rest:

> "Appellant contends that Section 85.93, Stats., makes an insurer of an owner of an automobile liable to a person injured regardless of the liability of the insured under the policy and cites *Oertel v. Williams* * * * in support of the contention. We can perceive no such effect either of the statute or of the decision cited . . . There is nothing [in the statute] to negative the idea that the insurer is not liable unless the insured is . . . As to the statute, it does not create liability against the insurer. Liability against the insurer, if any exists, is created by the insurance contract, not by the statute." *Hunt*, supra, 224 Wis. at 53, 271 N.W. at 409.

[1] Please note the typographical error appearing at page 136 of the the lower Court's opinion. The quote from the *Nichols* opinion should read as follows:

> "[t]he fact that a third party can sue an insurer of a motor vehicle direct . . . without first recovering a judgment against the insured defendant does not enlarge the coverage afforded by such policy or determine the insurer's liability thereunder. The third party can only recover from the insurer by virtue of the contract existing between it and its insured.

Indeed, the case now relied upon by petitioner, *Kujawa v. American Indemnity Co.*, 245 Wis. 361, 14 N.W.2d 31, 151 A.L.R. 1133 (1944) is not support for his position at all for it cites both *Nichols* and another case on the point, *Weichmann v. Haber*, 211 Wis. 333, 248 N.W. 112 (1933) with approval. In *Weichmann* the Wisconsin Supreme Court held that the abatement of a cause of action for wrongful death by the death of the defendant insured under an automobile policy also abated the cause of action against the insurer. The Court concluded that neither the statute nor the case law indicated an intention to create liability as to an insurer completely disassociated from any liability on the part of an insured.

Petitioner has referred to this Court's decision in *Lumberman's Mutual Casualty Company v. Elbert*, 348 U.S. 48, 99 L.Ed. 59, 75 S. Ct. 151 (1954). *Elbert* raises a question of federal jurisdiction under Louisiana law and deals with Louisiana's direct action statute. Since the decisional law under the statute and the statute itself vary significantly from Wisconsin law, the *Elbert* decision provides no support to petitioner in the case at bar.

In short, under Wisconsin law, a defense available to the insured is also available to the insurer.

Petitioner also argues that at the time that his action was commenced, neither state nor federal law precluded him from prosecuting his claim against the administrator of Robert Thompson's estate. This argument is manifestly incorrect. Rule 13(a) certainly precluded any such claim being prosecuted in federal court and even in state court, the Rule 13(a) bar would have precluded the prosecution of such a claim. See *London v. City of Philadelphia*, 412 Pa. 496, 194 A.2d 910

(1963); *Horn v. Woolever*, 170 Oh. 178, 163 N.E.2d 378, cert. denied 80 S. Ct. 861, 362 U.S. 951, 4 L.Ed.2d 868 (1959); *Meachan v. Halley*, 38 Tenn. App. 20, 270 S.W.2d 503 (1954); and *Jocie Motor Lines, Inc. v. Johnson*, 231 N.C. 367, 57 S.E.2d 388 (1950). In addition to the authority provided by this case law, we direct the Court's attention to 6 Wright and Miller, *Federal Practice and Procedure* § 1417 at b.102

> ". . . State Courts have generally adopted the approach of treating the barring effect of the rule as substantive and have declined to hear any claim not pleaded in a prior Federal action as required by Rule 13(a)."

III. THERE HAS BEEN NO ABRIDGMENT OF A SUBSTANTIVE RIGHT CREATED BY STATE STATUTE.

Petitioner's claim that his substantive right under Wisconsin's direct action statute has been wrongfully abridged is without merit. A moment's reflection discloses the error in the argument. If the argument were correct, then we are left with the conclusion that if there had been a jury verdict in the Minnesota action finding Robert Thompson free of any negligence and finding Duane Fagnan one hundred percent at fault, this verdict would not have been binding upon Fagnan in his subsequent suit against Robert Thompson's insurer in Wisconsin. This is not the law.

While it is true that application of the Rule 13(a) bar in this case results in Duane Fagnan not having a right of recovery over against Great Central in the second suit, an "outcome determination" analysis as to the permissible scope for the application of a federal rule of civil procedure has never been the proper talisman. *Hanna v. Plumer*, 380 U.S. 460, 80 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

The very laudable purpose of Rule 13(a) is to avoid multiplicity of suits and circuitry of action. *Southern Construction Company, Inc. v. Pickard*, 371 U.S. 57, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962). As was stated in *Hanna*, supra:

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over Federal Procedure or Congress' attempt to exercise that power in the Enabling Act." 380 U.S. at 473, 474, 85 S.Ct. at 1145, 14 L.Ed.2d at 22.

CONCLUSION

According to Rule 19, Supreme Court Rules, a petition for issuance of a Writ of Certiorari is to be granted only where there are special and important reasons therefore. These may include the need to resolve a conflict in decisions amongst two or more Courts of Appeals, the importance in correcting a decision of a Court of Appeal which is in conflict with applicable decisions of this Court, and to review a decision regarding an important question of Federal law which has not previously been settled by this Court.

Given the parameters established by Rule 19, this is clearly not a case warranting the issuance of a Writ of Certiorari and the petition herein should be denied.

Dated:

Respectfully submitted,

GISLASON AND MARTIN, P.A.
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Attorneys for Respondent
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